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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 509

THE H. ROUW COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner prays that Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's judgment entered in this cause on August 27, 1958.

OPINIONS BELOW.

The two memorandum opinions of the District Court (R. 165 and R. 197) are unreported.

The opinion of the Court of Appeals, included in the record (R. 223) and in this petition as an appendix, is unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 27, 1958. Petition for rehearing was denied, with one modification, on September 24, 1958. Second petition for rehearing was denied on October 27, 1958. The jurisdiction of this Court is invoked under Article 1254(1) of Title 28, United States Code.

QUESTION PRESENTED.

With the Chief Justice dissenting, the majority opinion of the Circuit Court has reversed the District Court on the question as to the measure of damages recoverable on rail shipments of perishable property damaged in transit by the negligence of the carrier, such shipments being shipped in interstate commerce pursuant to the terms of the uniform domestic straight bill of lading contract, and subject to the provisions of the Interstate Commerce Act, Title 49, U.S.C.A. 20 (11), as amended, or what is commonly called the Carmack Amendment, in a suit by the consignor against the initial carrier where the shipment was consigned to a commission merchant consignee.

The District Court found the full actual loss to the property damaged by applying the fundamental measure of

damages "would be the difference between the wholesale market price of the commodities had they arrived in the condition they should have been had they been properly and promptly transported, and the market value in the condition in which they were delivered", the majority opinion held that from this value so found by the District Court there should be a deduction of the amount that would have gone to the commission merchant had the shipment been in good condition, and to allow the owner, or anyone entitled to recover damages without this deduction would be an unjust enrichment or more than indemnity.

The question then does the consignee commission merchant, who must satisfy the carrier's freight charges to obtain delivery of the shipment, thereby becoming a party to the shipping contract with the resulting obligations and rights in connection therewith consisting of the right of possession of the property superior to that of the carrier, the right to sue for freight overcharges, subject to being sued with the resulting liabilities for freight undercharges and with a property right which would have been sufficient to maintain this action, have any beneficial interest in the damages recoverable to the property in a suit by the shipper consignor or is his interest simply an item of expense that would have been incurred if the property had not been damaged that should be deducted from the full actual loss to the property as the majority opinion of the Circuit Court has so held?

The further question presented, shall the manner a shipment is marketed be the criterion of amount of recovery against the carrier for damages to the property resulting from carrier mishandling, particularly if such criterion opens the door to both discrimination in amount of recovery depending upon the manner of marketing and limit the

carrier's liability to an amount less than the full actual loss to the property?

On one shipment of the twelve involved herein, it was necessary that the consignee, commission merchant, in order to make sale, pay the cartage or cost of transporting the shipment from the point of the delivery by the carrier to the commission merchant's store to recondition, because of the damage to the shipment. The testimony was to the effect that had shipment been in good condition it could have been sold without such cartage expense. Five crates of cantaloupes were damaged to such an extent that they could not be salvaged, and as a result no cartage expense of 10¢ per crate was incurred on such five crates. The question, then, should the carrier be entitled to a credit of 50¢ on the full actual loss to the property, on the theory that its wrongdoing saved such expense from having been incurred?

STATUTE INVOLVED.

Interstate Commerce Act, Title 49, U.S.C.A., Section 20 (11).

Section 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common

carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by

water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That

nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. February 4, 1887, c. 104, Pt. I, Section 20, 24 Stat. 386; June 29, 1906, c. 3591, Section 7, 34 Stat. 593; March 4, 1915, c. 176, Section 1, 38 Stat. 1196; August 9, 1916, c. 301, 39 Stat. 441; February 28, 1920, c. 91, Sections 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; March 4, 1927, c. 510, Section 3, 44 Stat. 1448; April 23, 1930, c. 208, 46 Stat. 251; August 9, 1935, c. 498, Section 1, 49 Stat. 543; September 18, 1940, c. 722, Title I, Section 13(b), 54 Stat. 919.

STATEMENT OF THE CASE.

The basis of Federal jurisdiction in the court of first instance was pursuant to Section 1441(b) and Section 1445-(b), Title 28, U. S. C. A.

In the case before the Court there were shipped by the petitioner as consignor, from Edinburg, in the Rio Grande Valley of Texas, ten cars of tomatoes to Strazzula Brothers in Boston, Massachusetts, and two cars of canteloupes, one to Harry Klein & Company, New York City, and the other to Max Feldbaum and Sons, in Philadelphia. The consignees were wholesale dealers on their respective markets. As dealers, they would buy some shipments consigned to them either outright or on a joint or partnership basis with the petitioner, or would handle some shipments on a brokerage basis, or would accept delivery of some shipments on a commission merchant basis. All the shipments here involved were ultimately handled on a commission merchant basis.

All shipments were found at destination to show damage resulting from carrier handling, principally caused from rough handling in transit, resulting in breakage, bruising and decay, but also caused by improper refrigeration and delay.

On all shipments involved Section 7 of the bill of lading contract was signed by the petitioner consignor (Record 213 and 214), obligating the consignee commission merchant to pay all the freight charges, which were paid by such consignees.

On the ten shipments to the Strazzula Brothers in Boston, the consignee filed a claim against the delivering carrier, and subsequently the consignee turned all documents

and papers over to the petitioner consignor, and the petitioner filed an additional claim with the initial carrier in the name of and on behalf of both the consignor (petitioner) and consignee. On the shipments to Harry Klein & Company and Max Feldbaum & Sons, all papers and documents were turned over to the petitioner by such receivers, and petitioner filed claim with the initial carrier in the name of and on behalf of both the petitioner consignor and consignee. The consignees Harry Klein & Company and Max Feldbaum & Sons, had often made cash advances to the consignor with each having advanced $10,000.00 about the time of the shipments in question. Such advances were not designated to any particular shipments because the shipper and receivers had had 15 to 20 years past highly satisfactory dealings, and each having the utmost confidence in the word of the other. On sales of such shipments made by the receivers, consignees, or credit, on the wholesale market, the credit risk was the entire responsibility of the commission merchant.

After the claims were declined the petitioner filed suit for the full actual loss to the property, such loss being based on the difference in the reasonable wholesale cash market value such shipment would have had on the wholesale market at their respective destinations had shipments arrived in good condition and the market value of such shipments in their damaged condition upon such destination markets. The evidence reflects that considerably more effort was used to salvage shipments than would have been necessary had shipments arrived in good condition. The market value of the shipments in their damaged condition in each instance was also the amount that the shipment ultimately sold for.

The Trial Court awarded the recovery of damages on each shipment based on such measure of damages. No

question has been raised as to the amount of the damages to the property that the Trial Court found and for which it awarded judgment. There is no question that such amount is the full actual loss to the property. The respondent carrier raised the question that there should be deducted from this actual loss to the property the interest of the commission merchant, or in words of the respondent, the commission that the petitioner would have had to pay had shipments been in good condition.

The Trial Court denied this deduction, basing his ruling on

> "* * * Thompson v. H. Rouw Company, (Tex. Civ. App.) 237 S. W. 2d 662, Texas & New Orleans Railroad Co. v. H. Rouw Company, (Tex. Civ. App.) 271 S. W. 2d 666, and cases therein cited and discussed. This Court holds the measure of damage to be the difference between the wholesale market price of the commodities had they arrived in the condition they should have been had they been properly and promptly transported and the same market value in the condition in which they were delivered."

The Trial Court found that ordinarily there would have been forthcoming to the Strazzulla Brothers, had the shipments arrived in good condition, $262.48 (Record 197), and to Harry Klein & Company $16.00, and to Max Feldbaum & Sons $30.00.

The majority opinion of the Circuit Court recognized the measure of damages on such interstate shipments to be controlled by the Interstate Commerce Act, 49 U. S. C. A., Par. 20 (11), and that the full actual loss to the property was the difference in the market value had shipment arrived in good condition, and its market value in its damaged condition was undoubtedly the rule of general application, and the rule that the lower court followed. The

majority opinion of the Circuit Court then departed from 49 U.S.C.A. 20 (11), which allows the holder of the bill of lading contract, or anyone entitled to recover thereon, to recover the full actual loss to the property, and in departing from this rule of damages and the wording of the Carmack Amendment held that from this full actual loss to the property, the loss to the petitioner was all that was recoverable, and that there should be such a deduction or otherwise the petitioner would have a recovery that would be an unjust enrichment and more than indemnity.

The majority opinion of the Circuit Court based its ruling principally on dictum in *Chicago, Milwaukee & St. Paul Railroad Company* v. *McCaull-Dinsmore Company*, 253 U. S. Rep. 97, and *Crail* v. *Illinois Central Railroad Company*, 281 U. S. 57. Both of these cases set down and applied the same rule as followed by the Trial Court in the present case. The dictum was generally to the effect that this rule was one of convenience and could be departed from if the facts were such as to allow departure.

In the Circuit Court Chief Justice Hutcheson dissented, stating:

> "Of the clear view that the two Texas cases relied on by the District Judge and cited in the opinion of the majority were correctly decided and that the majority opinion tithes mint, anise and cumin while rejecting weighter matters of the law, I align myself with the Texas courts and respectfully dissent from the opinion and decision of the majority."

The petitioner pointed out in appellee's first motion for rehearing, among other things, that the majority opinion was in error in that it had the effect of destroying the property right of the consignee commission merchant, and further in error in making a finding that the petitioner

was the owner of the shipment in view of Title 49, Par. 20 (11), which provides that the carrier "shall be liable to the lawful holder of the bill of lading contract or any party entitled to recover thereon * * *" as a clear recognition by Congress of the community of interest of ownership in such shipments. The petitioner further pointed out there was well established authority recognizing the special and beneficial interest that developes in shipments of this nature, and the only way that ownership could be completely vested in the petitioner would be for the petitioner to have its own agents handle the sale or disposition at the destination market, with such salesmen working on a salary basis, then the ownership would be fixed and determined, and then of course there would be no ground whatsoever for the respondent's contention.

On consideration of appellee's first motion for rehearing, the Circuit Court modified its opinion of August 27, 1958, by the addition of the words "or the party entitled to recover" after the word "owner" in the third line of said opinion. The first sentence as originally written was

> "This appeal presents the question of the correct measure of damages which should be allowed the owner of an interstate shipment of perishables damaged by the negligence of a common carrier by rail."

And as amended, this first sentence reads as follows:

> "This appeal presents the question of the correct measure of damages which should be allowed the owner or the party entitled to recover of an interstate shipment of perishables damaged by the negligence of a common carrier by rail."

Your Petitioner filed a Second Motion for Rehearing, pointing out that the opinion of the majority, in departing from the common law rule of damages and the wording

of the Carmack Amendment, which allows anyone entitled to recover, to recover the full actual loss to the property, had abandoned these principles in basing its opinion upon loss to the petitioner as distinguished from loss to the property. The petitioner further pointed out that such opinion by the majority as amended, was in conflict with the opinions of this Court on questions directly related to the question there involved. Such opinions are reported as follows:

George J. Adams et al. v. *Ogden L. Mills, Director General et al.*, 76 L. Ed. 1184, 286 U. S. 397.

Chicago, Milwaukee & St. Paul R. Co. v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 64 L. Ed. 801.

Illinois Steel Co. v. *Baltimore & O. R. Co.*, 320 U. S. 508, 64 S. Ct. 322.

Pennsylvania Railroad Co. v. *Olivit Brothers*, 61 L. Ed. 908, 243 U. S. 574.

Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. *Alvin J. Fink*, 63 L. Ed. 1151, 250 U. S. 577.

St. Louis, I. M. & S. R. Co. v. *Starbird*, 61 L. Ed. 917, 243 U. S. 592.

That such opinion was in conflict with *Pennsylvania Railroad Company* v. *Titus*, 109 N. E. 857, with Judge Cardozo concurring in the opinion, and with this Court in the Fink case citing the Titus case with approval.

The petitioner will go further into these cases and its reasons for granting the Writ, but they could be summarized to support the following propositions: That the Supreme Court of the United States has held in connection with shipments of the nature of the ones in question that the consignee, commission merchant is a party to the bill of lading contract (Fink and Titus cases); that such consignee, commission merchant can be sued for freight charges

even after he had settled with the consignor (York and Whitney cases), or that he could maintain an action for overcharges, in fact had a duty to sue for such charges, and that the carrier wrongdoer had no right to concern itself with the subsequent settlement of interest between the consignor and consignee (Adams case); that the ownership of the property damaged is of no concern to the carrier in a suit between the holder of the bill of lading contract and the carrier (Olivit case); that if in fact the consignee had no interest in the contract it could have filed such notice with the carrier to relieve itself from liability in connection with the contract, and that no such notice had been filed in the present case (Illinois Steel case); that the consignee, commission merchant could have maintained this action (Starbird case); and that the consignee, commission merchant was as much a contractee as the consignor to fall within the rule of the McCaull-Dinsmore case, that the actual loss caused by breach of contract was the loss of what the contractee would have had, had the contract been performed.

That in view of these authorities, for the majority opinion to hold that the interest of such commission merchant was an unrecoverable expense was in conflict with such principles of the Supreme Court, and placed such consignee, commission merchant in the position of having definite rights and obligations in connection with the shipping contract, and as a party thereto, with the right to maintain an action of the nature of the one in the present case, but could not recover that part of the property it would have had, had the carrier not breached its obligation.

To this Second Motion for Rehearing the Circuit Court entered an Order denying petition, with no opinion rendered in connection therewith, but with Chief Justice Hutcheson dissenting.

SPECIFICATION OF ERRORS.

The Circuit Court erred:

1. In failing to hold, as a matter of law, that the consignee commission merchant was a contractee of the bill of lading contract, with a property right and interest in the shipment and in the damages recoverable.

2. In concluding, as a matter of law, that the interest of the consignee commission merchant was merely an expense that should be deducted from the full actual loss to the property.

3. In concluding, as a matter of law, that it would be unjust enrichment or more than indemnity to allow recovery of the full actual loss to the property.

4. In failing to correctly apply the provisions of the Carmack Amendment.

5. In failing to recognize the basic fact situation of the Crail case and the failure to apply the basic holding of the Crail case.

6. In departing from the common law rule of damages.

7. In allowing a discrimination in recovery and limitation of carrier's liability by making the manner of marketing a criterion of the damages recoverable.

REASONS FOR GRANTING WRIT.

There is a question of Federal law arising by virtue of the Interstate Commerce Act, Title 49, U. S. C. 20 (11), or what is commonly called the "Carmack Amendment", involved in this case, of great importance. The exact

question has never before been decided by this Court, although questions directly related to the one here presented, have been previously presented to this Court, and the majority opinion of the Circuit Court is in conflict with the decision of this Court on such related questions.

The majority opinion of the Circuit Court is in direct conflict with the Texas Appellate Courts where on two occasions the question here raised was there presented and on both occasions the Texas Courts, in construing the Federal law applicable to this question, overruled the carrier's contention that is here sustained by the majority opinion. *Thompson* v. *The H. Rouw Company*, 237 S. W. 2d 662 (Writ of error refused by the Supreme Court with the notation no reversible error), and the *Texas and New Orleans Railroad Company* v. *The H. Rouw Company*, 271 S. W. 2d 666 (Writ of error dismissed by the Supreme Court of Texas). Justice Hutcheson, Chief Justice of the Circuit Court, dissented from the opinion and decision of the majority, stating that the District Judge in the present case properly applied the two Texas cases and stating further that the majority opinion of the Court was in error in rejecting the weightier matters of the law. The Circuit Court had cited, prior to its decision in the present case, the *Texas & New Orleans Railroad* v. *The H. Rouw Company*, 271 S. W. 2d 666, 669, with apparent approval in the *Fort Worth, Denver Railway Company* v. *United States of America*, 242 F. 2d 702, by opinion entered March 28, 1957.

The majority opinion of the Circuit Court has held in a suit between the shipper consignor and carrier that is subject to the uniform domestic straight bill of lading contract, and the Carmack Amendment, Title 49, U. S. C. 20 (11), on a shipment ultimately consigned to a commission merchant consignee and such consignee having accepted delivery of the shipment, that it would be unjust enrich-

ment or more than indemnity for the owner, or anyone entitled to recover, to recover the full actual loss to the property, (such loss being based on the difference in the wholesale market value said property would have had at its destination had it arrived in good condition and the market value of such property in its damaged condition, (such value in its damaged condition incidentally being the amount such shipment was diligently sold for by the consignee)), since from such full actual loss there should be a deduction of the commission merchant consignee's interest. The majority opinion of the Circuit Court does not recognize that the commission merchant consignee has an interest but only that such commissions that would have been forthcoming to the commission merchant consignee but for the negligence of the carrier resulting in damage to the property, was an expense that would have been necessary to obtain the wholesale market value of the shipments had they arrived in good condition.

A.

The petitioner contends that the majority opinion of the Circuit Court, in so holding, has destroyed a property right and has allowed the carrier, the wrongdoer, to profit by its own wrongdoing to the extent of the commission merchant consignee's interest in this cause of action. At this point such interest should be examined.

It is perfectly well settled that the consignee commission merchant on shipments of this nature, became a party to the contract;[1] assuming definite obligations as a factor[1a]

1. *Pennsylvania Railroad* v. *Titus*, 109 N. E. 857, 216 N. Y. 17, L. R. A. 1916E. 1127, Ann. Cas. 1917C. 862; with Judge Cardozo concurring in the opinion; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Alvin J. Fink*, 250 U. S. 577, 63 L. Ed. 1151; *George J. Adams et al.* v. *Ogden L. Mills, Director General, et al.*,

was obligated to pay the freight charges, and once such charges paid, had right of possession to the property superior to the carrier;[2] was under a duty to salvage shipment and mitigate the damages;[3] could maintain an action against the carrier for freight overcharges;[4] and could have brought this action[5].

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286 U. S. 397, 76 L. Ed. 1184, Opinion May 23, 1932, by Justice Brandeis; *New York Central & Hudson River Railroad Company* v. *York & Whitney Company*, (No. 280) and *York & Whitney Company* v. *New York Central & Hudson River Railroad Company*, (No. 281) 256 U. S. 406, 65 L. Ed. 1016.

1a. 22 Am. Jur., Factors, beginning at Page 305.

2. Sec. 7 of the bill of lading contract was signed by the consignor in the space provided on the face of the bill of lading contract on each shipment herein. The obligations resulting are clearly shown in *Illinois Steel Co.* v. *Baltimore & O. R. Co.*, 320 U. S. 508, 64 S. Ct. 322. See also *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Alvin J. Fink*, 250 U. S. 577, 63 L. Ed. 1151; *George J. Adams et al.* v. *Ogden L. Mills, Director General, et al.*, 286 U. S. 397, 76 L. Ed. 1184, Opinion May 23, 1932, by Justice Brandeis; *New York Central & Hudson River Railroad Company* v. *York & Whitney Company*, (No. 280) and *York & Whitney Company* v. *New York Central & Hudson River Railroad Company*, (No. 281) 256 U. S. 406, 65 L. Ed. 1016.

3. *The Secretary of Agriculture of the United States* v. *United States of America, Interstate Commerce Commission et al.*, 100 L. Ed. 173, 350 U. S. 162, 76 S. Ct. 244; *Gulf, C. & S. F. R. Co.* v. *Texas Packing Co.*, Tex., 37 S. Ct. 487, 244 U. S. 31, 61 L. Ed. 970.

4. *George J. Adams et al.* v. *Ogden L. Mills, Director General, et al.*, 286 U. S. 397, 76 L. Ed. 1184, Opinion May 23, 1932, by Justice Brandeis; *E. B. Spiller* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, 253 U. S. 117, 64 L. Ed. 810.

5. *St. Louis, I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, 61 L. Ed. 917; *Edgerton* v. *Chicago, R. I. & P. R. Co.*, 240 Ill. 311, 88 N. E. 808, S. Ct. Ill. 1909; *Thompson* v *H. Rouw Company*, (Tex. Civ. App.) 237 S. W. 2d 662; *Texas & New Orleans Railroad Co.* v. *The H. Rouw Company*, (Tex. Civ. App.) 271 S. W. 2d 666; *Terry* v. *Pennsylvania Railroad Company*, 156 Atl. 787 (S. Ct. of

Thus this Court had recognized the right of the consignee commission merchant to maintain an action of the nature of the one in question for damages to the property or for freight overcharges, and this Court has held further that the plaintiff, if the lawful holder of the bill of lading contract, need not prove ownership in the property. *Pennsylvania Railroad Co.* v. *Olivit Brothers*, 243 U.S. 574, 61 L. Ed. 908.

B.

Now the majority opinion of the Circuit Court has held that the interest of such commission merchant consignee could not be recovered in a suit by shipper consignor or ANYONE ENTITLED TO RECOVER. Thus you have the resulting situation where the consignee commission merchant could maintain this action, but the interest of the consignee commission merchant in such action would not be recoverable.

That the majority opinion of the Circuit Court is in error would seem to be unquestionable. That such error, which has the effect of destroying a property right that has been universally recognized and the fact that a great many of the business transactions in this country are handled on the basis as the shipments herein were handled makes the question here presented one of great public concern.

The provision of the Carmack Amendment, Title 49, U. S. C. A. 20 (11), applicable to the question here presented states that the carrier

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Del., 1931); *Collins et al.* v. *Denver & R. G. Ry. Co.*, 167 S. W. 1178 (K. C. Ct. of App., 1914); 13 Corpus Juris Secundum, Carriers, Paragraph 249(k).

"* * * shall be liable to the lawful holder of said receipt or bill of lading OR TO ANY PARTY ENTITLED TO RECOVER THEREON, whether such receipt or bill of lading has been issued or not; for the FULL ACTUAL LOSS, DAMAGE OR INJURY TO SUCH PROPERTY caused by it * * *."

The essence of this provision is that it permits full recovery to the lawful holder of the bill of lading. The statute does not speak of damages to the consignor nor of damages to the consignee, but of damages to the property. The holder of the bill of lading may bring the suit for those damages and the measure of damages is clear. The statute under construction is a rule of convenience. It enables a single suit against all the carriers along the line for the full loss to the property. It manifests an intent to avoid multiplicity of actions and circuity of action and clearly allows *any party* entitled to recover, to recover full actual loss to the property.

C.

This full actual loss has repeatedly been held to mean the difference between the wholesale market value at destination had the shipment arrived in good condition and the market value of the shipment in the condition in which it did arrive. This is the common law rule of damages measured by the wholesale market value that Mr. Justice Holmes affirmed in *Chicago, Milwaukee & St. Paul Railroad Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 64 L. Ed. 801. Scores of cases in an unbroken line confirm the Rule.[6] And this is the very Rule applied by the District Court in the present case.

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6. *New York, L. & E. and W. R. Co.* v. *Estill*, 147 U. S. 591, 13 S. Ct. 445 at Page 454; *Mobile & M. Railroad* v. *Jurey*, 111 U. S. 584, 4 S. Ct. 566; *The Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016; *Pennsylvania R. Co.*

The majority opinion of the Circuit Court departed from this overwhelming authority, basing its departure on the *McCaull-Dinsmore* case, *supra*, and *Illinois Central R. Co.* v. *Crail*, 281 U. S. 57, 50 S. Ct. 180, 74 L. Ed. 699, 67 A. L. R. 1423. Both the McCaull-Dinsmore and Crail cases however, stated and applied the common law rule of damages as applied by the District Court in the present case. The Court in the Crail case refused to allow the consignee of a coal shipment damages computed at retail prices for a small quantity of coal that was lost in shipment. The Court held that the damages measured by retail prices would be improper and that the correct measure was the wholesale market value on a basis of the entire carload of coal. The Crail case rejects a retail price and accepts a wholesale value as the basis for measuring damages. The case by no construction can mean that the wholesale value should be rejected. The Court stated in part:

> "In the absence of special circumstances, the damage for shortage in delivery by the seller of fungible goods sold by quantity is measured by the bulk price rather than the price for smaller quantities, both at

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v. *Wm. H. Muller & Co.*, 4 Cir., 15 F. 2d 535, certiorari denied 273 U. S. 748, 47 S. Ct. 449, 71 L. Ed. 872; *American Ry. Express Co.* v. *Ewing Thomas Converting Co.*, 3 Cir., 292 Fed. 335; *Bussey* v. *Memphis & Little Rock R. Co., C. C.*, 13 Fed. 330; *Railway Express Agency* v. *Smith*, D. C., 116 F. Supp. 609; *Rio Grande & E. P. R. Co.* v. *T. A. Austin & Co.*, Tex. Com. App., 25 S. W. 2d 306; *Texas Mexican Ry. Co.* v. *Slaughter*, Tex. Civ. App., 241 S. W. 2d 749; *Thompson* v. *A. J. Tebbe & Sons Co.*, Tex. Civ. App., 241 S. W. 2d 627; *Thompson* v. *Tankersley*, Tex. Civ. App., 238 S. W. 2d 263; *Thompson* v. *Associated Growers of Brownsville*, Tex. Civ. App., 162 S. W. 2d 754; *American Ry. Express Co.* v. *McDaniel*, Tex. Civ. App., 20 S. W. 2d 1104; *Coulter* v. *Gulf, C. & S. F. Ry. Co.*, Tex. Civ. App., 286 S. W. 559; *Gulf, C. & S. F. Ry. Co.* v. *Stewart*, Tex. Civ. App., 141 S. W. 1020; 8 Tex. Jur., Carriers, Sec. 227; 9 Am. Jur., Carriers, Sec. 781; 13 C. J. S., Carriers, Sec. 264, notes 24 and 25.

common law, see Morgan v. Gath, 3 Hurl. & Co., 748 (159 Eng. Reprint, 726); Avery v. Willson, 81 N. Y. 341, 37 Am. Rep. 503, and under section 44 of the Uniform Sales Act. Likewise, we think that the wholesale market price is to be preferred as a test over the retail when, in circumstances like the present, it is clearly the more accurate measure. Brown Coal Co. v. Illinois Central R. Co., 186 Iowa 562, 192 N. W. 920. See State (Use of Hayden) v. Smith, 31 Mo. 566; Wendnagel v. Houston, supra (155 Ill. App. 664, 666, 667); Wood & Co. v. Chicago, M. & St. P. R. Co., 320 Ill. 341, 151 N. E. 229. Compare Heidritter Lumber Co. v. Central R. Co., 100 N. J. L. 402, 122 Atl. 691; 125 Atl. 926; Leominster Fuel Co. v. New York, N. H. & H. R. Co., 258 Mass. 149, 154 N. E. 831, 50 A. L. R. 1464, cited as supporting the conclusion of the court below. In these cases it does not clearly appear whether the consignee suffered special damage by reason of the shortage, measured by the retail price, or whether he did or could replace it at the wholesale price in the ordinary course of business."

There is a significant distinction in the fact situation in the present case and the fact situations in the McCaull-Dinsmore and the Crail cases. A distinction that would strengthen the application of the rule rather than allow a departure. The Crail case reflects that it was a suit by a consignee for damages to coal being lost in transit, and the McCaull-Dinsmore case was a suit by the shipper for damages resulting from wheat being lost in transit. In neither case is there a shipper-consignee commission merchant relationship existing. In both cases the commodity shipped was lost. In the present case the commodity shipped, cantaloupes and tomatoes, were not lost, but damaged—the commission merchant was under a duty to salvage and mitigate the damages (that this was reasonably done was not questioned). In the present case you have a shipping contract made by the shipper-consignor with the carrier, with the

consignee commission merchant becoming a party to that contract (Note 2). In addition to the freight charges that the consignee in the present case was obligated to and did pay to support its privity of contract, you have consideration running directly from the commission merchant to the carrier. This consideration is the commission merchant's performing the duty to salvage to mitigate the loss to the property resulting from the carrier's, the wrongdoer, mishandling. Such duty was recently emphasized by this Court in *The Secretary of Agriculture of the United States v. The United States of America Interstate Commerce Commission et al.*, 350 U. S. 162, 76 S. Ct. 244, 100 L. Ed. 173, in Note 20, where this Court stated:

> "The carrier can ask no more than that the consignee act reasonably in mitigating damages. * * *"

Notwithstanding this distinction the majority opinion of the Circuit Court has allowed a deduction of the commission merchant's interest from the full actual loss to the property damaged. Mr. Justice Holmes, in the McCaull-Dinsmore case, further stated:

> "that the actual loss caused by breach of contract is the loss of what the contractee would have had if the contract had been performed. * * *"

If then the consignor petitioner and consignee commission merchants were the contractees, which they undoubtedly were, then as such contractees they should be entitled to recover what they would have had if the contract had been performed or the full actual loss to the property.

D.

The respondent carrier has not contended in any manner that the receiver commission merchant has not done every act that would have been required had these ship-

ments arrived in good condition. There is no evidence that the consignee commission merchant did not do every act that would have been required had these shipments arrived in good condition; the majority opinion of the Circuit Court has not concluded nor inferred that the commission merchant was relieved from doing any act that he would have had to do had shipments arrived in good condition.

Affirmatively stating the proposition then, the consignee commission merchant has done every act in connection with these shipments that would have been required had the shipments arrived in good condition.

It is difficult, if not impossible, to conceive any instance where damaged commodities could be sold with less effort than the same commodities free of damage for a fair market value and especially is this true of tomatoes and cantaloupes. In this connection, everyone has walked into the market place and picked up a tomato or cantaloupe and carefully examined it for bruising or decay, quickly discarding it if found to contain either. The evidence is without question that the wholesale market buyer is even more critical, with experienced buyers wanting only top quality merchandise, free of injury or decay. Buyers' resistance then to bruised and decayed tomatoes and cantaloupes makes the selling thereof more difficult. The extent of buyers' resistance would determine the extent of the energy and effort in selling. These matters are fundamental, yet the majority opinion of the Circuit Court has held that its conclusions of unjust enrichment or more than indemnity would apply to anyone entitled to recover in a shipment of this nature.

A claim against the carrier for delay with a resulting market decline must also be considered in the light of the opinion of the majority of the Circuit Court, no damage

or injury to the commodity but simply a decline in the wholesale market value from the market date the car should have arrived if transported with reasonable dispatch and its reasonable wholesale market value on the date on which it did arrive. It is fundamental that market value is controlled by supply and demand. There may be related factors, but this is the principal element of control. If the market declines and there is either an increased supply or reduction in the demand for the commodity, either an increase in the supply or a reduction in the demand would result in a certain amount of more effort to dispose of a shipment, and consequently in this situation too the consignee commission merchant has done every act in connection with a shipment that would have been required had the carrier not delayed a shipment. This Court applied the common law rule on such a situation in *New York, Philadelphia & Norfolk Railroad Company* v. *Peninsula Produce Exchange of Maryland*, 240 U. S. 34, 36 S. Ct. 230.

If any weight or consideration is to be given to the line of authorities holding the consignee commission merchant a party to the shipping contract, if any weight or consideration is to be given to the line of authorities holding that the consignee commission merchant can sue for freight charges and can sue for freight overcharges, and if any weight and consideration is to be given to the line of authorities recognizing the consignee commission merchant's right to maintain an action of the nature of the present case, then the majority opinion of the Circuit Court must be considered from the viewpoint of any party entitled to recover on such action. To view such majority opinion from this viewpoint conclusively shows that its departure from the common law rule of damages allowing recovery of the full actual loss to the property is erroneous.

E.

There is a distinct and clear line of cases as to the rights of those interested in the recovery on a claim of the nature of the one in the principal case to work out their own distribution of the proceeds so recovered. This in itself re-affirms the rule that anyone entitled to recover shall be entitled to recover the full actual loss to the property. The authorities mentioned (Note 5) that have recognized the consignee commission merchant could have maintained this action, where the question was raised, have held further that there was a duty of the one so maintaining the action to account to the other for its interest in the cause of action. In the Collins case (*Collins et al.* v. *Denver & R. G. Ry. Co., supra*), the Court stated:

> "the judgment would bar another action by the real owner, and the owner's share would be held by the consignee to be accounted for by him. This seems to be in accord with the weight of authority."

The Court then cited seven cases and three texts supporting this rule, including 3 Hutcheson on Carriers, Paragraph 1306. This rule is further recognized in 13 C. J. S. on Carriers, Paragraph 249k, Note 94.

It would be virtually impossible for the one maintaining the suit for damages to shipments of the nature found in the present case, to make a payment to the other interested parties of their exact interest therein prior to the ultimate termination thereof, since until that time the exact extent of the carrier's liability would be undetermined. In this connection the record reflects that the petitioner sued for damages to the property for the total amount of $9,416.10, and interest and cost. The Trial Court awarded judgment for the total amount of $4,548.89, which included interest on the damages to the various

shipments to the date of the judgment. The Trial Court further found that

> "The testimony and the evidence is in sharp conflict as to the extent of the damage and the reasonable market value of the tomatoes had they arrived in good condition at destination * * *."

Prior to the opinion of the majority of the Circuit Court in the present case there had been no authority imposing a burden of proof upon the petitioner or anyone entitled to recover on an action of this nature, to show what consideration moves, or to show the accounting of the shipper to the receiver or the receiver to the shipper. Such consideration so moving or such accounting between the parties was held to be of no concern to the carrier, as long as its freight charges were paid. In *Thompson* v. *The H. Rouw Company*, *supra*, the court held:

> "The matter of accounting between a shipper and consignee is of no concern to the carrier. 9 Am. Jur., Carriers, Sec. 825."

F.

There was an attempt by the carrier to import a question similar to this in the *Adams* v. *Mills* case, *supra*, and Mr. Justice Brandeis strongly struck down such an attempt. The facts in the Adams case reflect a suit by a commission agent against the carrier to recover freight overcharge, and the carrier contended, as very similarly is contended in the present case, that such commission merchant plaintiff had no such interest in the claim that would entitle him to maintain the action. Mr. Justice Brandeis, speaking for the Court, and in overruling these contentions, held:

> * * * "Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor

the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers. This proceeding does not involve a controversy between the consignors and the consignees; and the carriers can not be allowed to import one into it. Compare Louisville & N. R. Co. v. Sloss-Sheffield Steel & I. Co., 269 U. S. 217, 238, 70 L. Ed. 242, 252, 46 S. Ct. 73. The rights of the shippers in the proceeds of the action will not be affected by our decision. Compare Jennison Bros. & Co. v. Dixon, 133 Minn. 268, 158 N. W. 398. Those rights might have been asserted by intervention in the proceedings before the Commission. They may still be asserted independently in appropriate proceedings later. The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge.

"An additional reason for permitting this action is that the relation between the parties to the shipments in question was that of principal and factor, not simply that of consignor and consignee. The Commission found that, as commission merchants, the plaintiffs were empowered, by well-established usage, to pay the freight and related charges; to file claims for overcharges; and to settle with the carriers therefor. Being factors for the shippers, it was not only their right but their duty to resist illegal exactions. This duty did not, as the District Court suggested terminate upon remission of the proceeds of the sale of the livestock, less the charges in fact paid. It persists, with the assent of the principals, until the claim for reparation shall have been prosecuted to a successful conclusion. It is urged, on behalf of the defendants, that the order of the Commission run in favor of the plaintiffs, not as factors, but as individuals. The con-

tention is contrary to the fact. But the form of the order is without importance * * *."

And exactly along the same line of reasoning, the Court, in *Texas & New Orleans Railroad Company* v. *The H. Rouw Company*, 271 S. W. 2d 666, at Page 671, held:

"We are at a loss to know how the court could make a judgment that would bind a commission agent as against the shipper when the agent is not a party to the suit. Whether the agent will sue and recover against the shipper was not before the court, and the court could write no judgment in this case denying him his rights should he seek to assert them * * *."

Congress has given the Secretary of Agriculture, not the carrier, the authority of supervision of transactions between the shipper and receivers of the commodities in question in what is commonly called the Perishable Agricultural Commodities Act, Title 7, U.S.C., Chapter 20a, Section 499, and subdivisions thereunder and amendments thereto, perishable agricultural commodities are defined as

499a (4)

"Fresh fruits and fresh vegetables of every kind and character;"

with the transactions covered by such chapter being shipments of such commodities in interstate or foreign commerce and that such transaction

499a (8)

"shall be considered an interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity * * * are sent from one state with the expectation that they will end their transit, after purchase, in another * * *."

Such chapter provides that it shall be unlawful in or in connection with any such transaction

499b (4)

> "For any commission merchant, dealer, or broker * * * to fail, or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; * * *."

Section 499e (a) (b), of the same Act clearly states that if any commission merchant, dealer, or broker violates any provision of Section 499b, he shall be liable to the person injured for the full amount of damages, and further that such liability may be enforced either by complaint to the Secretary of Agriculture or by suit in any court of competent jurisdiction, and further that this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.

499f gives the party complaining nine months after the cause of action accrues to make a complaint. With property right in a claim against the carrier in dispute such as involved in the present case, the cause of action of the one complaining would not accrue until payment had been received, since until that time the exact extent of the carrier's liability would be undetermined.

In addition to this, the Secretary of Agriculture can suspend the license of the dealer, commission merchant or broker that (499i) fails to keep records fully and correctly disclosing all transactions and (499m) the Secretary shall have the right to inspect such accounts, records and memorandum. 499g provides that failure to make payment of any award made by the Secretary to such complaint filed

before it would authorize the Secretary to suspend the license of one so failing to comply with such award.

In view of this elaborate structure provided by Congress, there should be no question whatsoever that the interest of the commission merchant or dealer will be protected, without the necessity of the carrier inserting a naked *jus tertii* into the proceeding.

G.

There is another and as equally important reason why this Writ should be granted. The very purpose of the Carmack Amendment was to avoid discrimination, this Court has so held in many cases. This Court held in *U. S. et al. v. Baltimore & O. R. Co.*, 333 U. S. 169, 68 S. Ct. 494,

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types. State of New York v. United States, 331 U. S. 284, 296, 67 S. Ct. 1207, 1213, and language of the broadest scope has been used to accomplish all the purposes of the Act. United States v. Pennsylvania R. Co., 323 U. S. 612, 616, 65 S. Ct. 471, 473, 89 L. Ed. 499."

The majority opinion of the Circuit Court opens the door to a great number of situations where there would be a discrimination in the amount of recovery on shipments controlled by the Carmack Amendment. The discrimination and inequities could be illustrated by two examples:

(1) A shipper of tomatoes and cantaloupes may consign the car to himself and handle the sale of such shipment personally on the destination market, or

(2) There may be an outright sale to the consignee and the consignee himself personally handle the sale of the car at the terminal market.

In neither of these instances could there be a conclusion of unjust enrichment nor more than indemnity to allow a recovery of the full actual loss to the property based upon the common law rule of damages. Then you have a shipment marketed by the consignee commission merchant as in the present case. Thus you could have three shipments of tomatoes or cantaloupes or any number of related commodities from the same origin, shipped under the same uniform domestic straight bill of lading contract, in interstate commerce subject to the same provisions of the Carmack Amendment, the three cars could be on the same train encountering the same rough handling in transit and upon arrival at the destination, being marketed under the three different manners of marketing, to hold that the Carmack Amendment allows a recovery of damages of a different amount in any of these situations strains the construction thereof to well past the breaking point and would be applying it directly counter to the aim intended by Congress, and would in addition allow the carrier to benefit in the one instance from its own wrongdoing to the detriment of the parties desiring to market their shipments as in the present case.

The facts in the present case reflect this exact situation. Two of the three receivers in the present case, Strazzulla, in Boston, and Feldbaum, in Philadelphia, testified that they marketed shipments on their respective wholesale markets that had either been, as in the case of Strazzulla, grown by him, packed in his packing sheds and with himself as both consignor and consignee, and in the case of Feldbaum, where he had bought an interest in a cantaloupe field in the Rio Grande Valley of Texas, and had marketed such cantaloupes himself upon the Philadelphia market. Under no circumstances can we conceive could the conclusions of the majority opinion of the Circuit Court of un-

just enrichment or more than indemnity apply. The majority opinion states the rule there stated shall apply to the

"owner, or anyone entitled to recover."

This would clearly seem to demonstrate that the majority opinion is in error, and should be corrected.

This discrimination feature alone, resulting from the erroneous conclusions of the majority opinion of the Circuit Court, which would give the wrongdoer carrier the interest of the commission merchant in addition to its freight charges is a solid and fundamental reason for this Court to grant this Petition.

This Court should grant this petition for still another reason. In carrier liability cases of the nature of the one presented in the present case, this Court has consistently struck down one attempt after the other of the carrier to limit its liability to an amount less than the full actual damages to the property.

In *The Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 55 S. Ct. 483, 294 U. S. 494, this Court held that a clause in the shipping contract that would limit the carrier's liability to less than the full actual loss to the property could not be sustained because it was repugnant to public policy for the carrier wrongdoer to escape liability from the consequences of its own negligence. The facts reflected that 581 barrels of cherries were lost out of a total cargo originally of 4,266 barrels during transit from Italy to the United States. The shipping contract contained a clause that if there was a claim for loss or damage to the shipment, damages would be based upon the invoice value of the entire shipment, plus the added expenses. While the shipment was in transit the destination market value of cherries in-

creased to such an extent that the remaining 3,685 barrels of cherries had a market value in excess of that stated in the invoice. The carrier contended that it was not liable for any damages because of this increase in the market value and the limitation placed on shipment by the shipping contract. This Court held that it would be against public policy to give effect to such provision and that the claimant was entitled to full loss based upon the difference in market value. That to sustain the carrier is

> "to relieve the carrier from the consequences of its negligence."

The Ansaldo case is consistent in principle with the McCaull-Dinsmore case and the *New York, Philadelphia & Norfolk R. Co.* v. *Peninsula Product Exchange of Maryland*, *supra*.

In *The Secretary of Agriculture of the United States* v. *United States of America, Interstate Commerce Commission et al.*, 350 U. S. 162, *supra*, a decision by this Court rendered in January, 1956, one of the reasons given by this Court in holding a tariff provision in violation of the Carmack Amendment that provided for a tolerance of 3% on eggs as the average damage found in the shipment at origin, thus limiting the carrier liability to damage in excess of 3%, was, that to sustain the tolerance provision would be

> "* * * a further reduction of the claim by the full amount of the tolerance would necessarily operate to 'limit' liability by approximately the full amount of the tolerance."

And of course the liability would have only been limited to 3%. In the present case the attempt is to limit the liability by at least 8%. The testimony is without dispute, however, that on many shipments handled by commission merchants, the commission merchant's interest is 10%.

The majority opinion of the Circuit Court has, notwithstanding the opinions of this Court and in direct conflict with the principles of this Court allowed the carrier respondent in the present case to limit its liability in the amount of 8%. For this reason this Court should grant this petition.

H.

Another reason why this Court should grant this petition is that the bill of lading contract provides

> "The carrier or party in possession of any of the property herein described shall be liable as at *common law* for any loss thereof or damages thereto, except as hereinafter provided." (Emphasis added) (Page 215 of Transcript).

The only case in American Jurisprudence that the petitioner has been able to discover where the question presented was as similar as the question here presented was the *Kyle* v. *Laurens Railroad Company*, 10 Rich. Law, S. C. 382, 383. There the Court used, with reference to the claim that commissions should be deducted, the following language:

> "The answer to the second question (whether or not the Defendant railroad company was entitled to deduct the commission), cannot, I think, be well doubted after it is properly considered. If, as in the case of Bridge v. Austin, 4 Mass. 115, he undertook to transport and sell, and for so doing he was to have 5% commission, it may well be in the case of a loss he would have the right to deduct commission, for that was part of his compensation for his services touching the article lost. But in these cases the carrier had nothing to do but deliver in Charleston. If a factor might have sold, it was a matter in which the Laurens R. R. had no interest whatsoever. To illustrate still

further, suppose the cotton had reached Charleston depot and carrier had refused to deliver and trover had been brought what would have been the plaintiff's damage? The value of the article, deducting the freight, and adding interest on the net value. In such a case, commission could not have been talked about. How, in any case, can any deduction be made for that which was to be subsequent to carrier's discharge of liability, by delivering the parcel? The authorities are, I think, clear against such allowance. Sedgwick on Damages, C. 13, P. 369, tells us the rule whereby the damages are fixed as a rule of law. At pages 370, 371, he tells us that the rule as to carriers is the value of the article lost or not delivered at the place of destination, deducting his freight. The same is substantially the ruling in Gillingham v. Dempsey, 12 Serg. & R. Pa., 183."

The only real distinction in the *Kyle* v. *Laurens* case and the present case is that distinction pointed out that the present case has from the Crail case and the McCaull-Dinsmore case. A distinction that would strengthen the application of the rule rather than allow a departure. In the present case the property was damaged, the commission merchant consignee became a party to the contract, assuming, as a result thereof, the rights and liabilities in connection therewith. This factor alone greatly fortifies, if need there be, the application of the common law to the present case. In the *Kyle* v. *Laurens* case the Court there rejected the contention even though it appears that the cotton was lost, and it does not appear that the receiver, commission merchant, was a party to the shipping contract.

I.

The Question of Cartage.

The majority opinion has by inference allowed even another deduction from the full actual loss to the property.

The evidence reflects that on one shipment of the twelve involved, the consignee commission merchant, in order to make sales, had to re-condition the shipment, because of the damaged condition. This was done at his store, and it cost 10¢ per crate to have the shipment transported from the point of the delivery by the carrier to his store. Five crates of cantaloupes were damaged to such an extent that they could not be salvaged, and as a result no cartage was paid on these five crates. The majority opinion, in concluding that there should be a deduction of other charges and since this is the only other charge that the respondent had asserted should be deducted, it would seem tantamount to a holding that even this item should be deducted.

CONCLUSION.

The foregoing considered, it is respectfully submitted that this Honorable Court should grant certiorari since there is an important question of Federal law arising that has never before been decided by this Court; the majority opinion of the Circuit Court has departed from established law; the principle involved, and destruction of the property right is of great importance, and for the further reason that questions directly related to the one presented have been previously presented to this Court and the majority opinion of the Circuit Court is in conflict with the decisions of this Court on such related questions.

Respectfully submitted,

Sawnie B. Smith

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Edinburg, Texas,
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SAWNIE B. SMITH AND
JAMES E. LITTLE,
Edinburg, Texas,
Of Counsel.

I certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded by U. S. Mail to the Attorney for the Respondent, Harry L. Hall, of Strickland, Wilkins, Hall & Mills, of Mission, Texas.

Sawnie B. Smith

SAWNIE B. SMITH.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17059

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

versus

THE H. ROUW COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(August 27, 1958.)

Before HUTCHESON, Chief Judge, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the question of the correct measure of damages which should be allowed the owner of an interstate shipment of perishables damaged by the negligence of a common carrier

by rail. Based upon two Texas cases[1] the court below held that "the measure of damages . . . [was] the difference between the wholesale market price of the commodities had they arrived in the condition they should have been had they been properly and promptly transported and the same market value in the condition in which they were delivered."[2]

The rule stated by the court below is undoubtedly the rule of general application, and both sides admit that this is true. But appellant claims that, under the facts of this case, the court should have deducted from

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1 Thompson v. The H. Rouw Company, 1951, 237 S.W. 2d 662, writ of error refused by the Supreme Court with notations of no reversible error; and Texas and New Orleans Railroad Co. v. The H. Rouw Company, 1954, 271 S.W. 2d 666, writ of error dismissed by the Supreme Court of Texas.

2 Appellee had filed suit against the initial carrier for damages to fifteen cars of tomatoes and two cars of cantaloupes shipped by it under uniform bills of lading from Edinburg, Texas. Five carloads of the tomatoes were diverted to New York City, ten carloads were shipped to Boston, one carload of cantaloupes was shipped to New York City, and one carload to Philadelphia, Pennsylvania. The tomatoes and melons were classified under United States standards, and all were in good condition when receipted for by the carrier and were in damaged condition upon arrival at destination.

The court below, sitting without a jury, found that the shipments were damaged by the negligence of the rail carriers, and no appeal was taken from that portion of the findings and the judgment based thereon. It fixed the amount of the damages by the application of the rule above quoted, and appellant raises on its appeal only the question of whether the trial court applied the correct measure of damages.

It was stated without challenge in the oral argument that, in some years, approximately a quarter of a million cars of vegetables and fruits are shipped out of the Rio Grande valley—in which Edinburg is situated—to distant points in interstate commerce. It is apparent from both briefs that this is a test case to determine the true measure of damages in such cases.

the gross amount of this difference in market value, the necessary expenses shown by the evidence to have been included in the award made by the court attributable to such difference. Appellee contends, on the other hand, that the court correctly allowed it the gross difference between the actual market value of the shipments as received and the market value which would have been realized if they had not been damaged in transit. We agree with the position of appellant.

The shipments involved here being interstate, the liability of the carrier and the measure of damages are determined by the Interstate Commerce Act[3] and the decisions of the Courts of the United States construing it. *G.F. & A. Ry. Co. v. Blish Milling Co.*, 1916, 241 U.S. 190; *St. Louis, I. Mt. & So. Ry. Co. v. Starbird, Etc.*, 1916, 243 U.S. 592; and *Southern Pacific Co. v. Stewart*, 1917, 245 U.S. 359. There can be no doubt that the damages allowed by the court below faithfully reflect the rule as worked out in the two Texas cases, which discuss ably and at great length various decisions of the United States Courts of Appeal and of the Supreme Court. The two Texas Courts concluded that the rule followed by the court below was one of universal and invariable application even though they conceded that it was merely a rule of convenience.

We are unable to agree with the conclusions reached in these two cases upon which the court below relied.

[3] 49 U.S.C.A. §20, Par. (11): "Any common carrier . . . subject to the provisions of this chapter . . . shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon . . . for the full actual loss, damage or injury to such property caused by it . . ."

Here, as there, the problem is simplified by the fact that the property constituting the damaged shipments had, in every instance, a market value at destination. The two Texas decisions took freight charges into consideration in arriving at the difference in market values, but declined, as did the court below, to take into account other items of necessary expense which, in our opinion, ought to be deducted in arriving at the true actual loss and damage. The rule of convenience quoted from the opinion of the court below would result, if applied thus categorically to the shipments here involved, in recovery by the appellee of more than its actual loss. Such a recovery would violate principles of law as universal in their application as that which the court below used as the basic and inflexible rule governing recovery in this case. These principles are well set forth in 15 American Jurisprudence, Damages, §13, p. 402:

> "The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot . . . hold a defendant liable in damages for more than the actual loss which was inflicted by his wrong . . . The law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken."

The evidence before the court below fairly established that shippers, including appellee, universally paid brokers a commission to dispose of such shipments at destination. That commission represented a charge each shipper was bound to pay upon the full amount received.

so that a carload of tomatoes would yield to the owner the amount for which it was sold, less the commission incurred in making the sale. By allowing appellee the gross amount of the difference between the market value of the shipments in damaged condition and the value which would have been applied if the shipments had not been damaged, the court did not deduct from this difference the amount of commissions which would have been incurred in selling them.[4]

The action of the court below in awarding appellee damages in the full gross amount of the difference between the two market values necessarily resulted, therefore, in the enrichment of appellee to the extent of the nondeducted commission, and permitted it a recovery of more damages than it actually suffered. This is, in our opinion, in derogation of the general rule above quoted from American Jurisprudence.

The rule adopted by the court below can be applied as herein set forth so as to make the shipper whole and not require the carrier to pay more than indemnity.

[4] For illustration, Count IV covered car No. 31827, whose market value in the condition it actually arrived was $2,049.50. The proof showed that the car was not in good condition, and if it had been in good condition the market value would have been $2,249.50. The court allowed the appellee damages in the sum of $200.00, representing the difference between the two market values. But to make any sale of these shipments, appellee would have been compelled to pay a commission, generally about eight percent. The allowance of the entire $200.00 difference did not conform, therefore, to the actual facts, because it included $16.00 (i.e., 8% of $200.00) commission which appellee would have been compelled to pay. The allowance as to each of the other cars was excessive to the same extent, and the court also failed to allow certain items of cartage which were proven as necessary expenses on some of the shipments.

What the Supreme Court said in *Chicago, Milwaukee and St. Paul Railway Co. v. McCaull-Dinsmore Co.*, 1920, 253 U.S. 97, 100, indicates that the rule should be applied in such a way as to achieve fairness and justice:

> "But the question is how the contract operates upon this case. . . . The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here."

The Supreme Court, in *Illinois Central Railroad Co. v. Crail*, 1930, 281 U.S. 57,[3] demonstrated clearly that the market value rule should be applied in such a way as to dove-tail with the rule permitting recovery of compensatory damages only. A carload of coal shipped to Crail was 5,500 pounds short, and both the District Court and the Circuit Court of Appeals awarded him recovery of $9.70 per ton, which was the amount he would have to pay to replace the coal at retail. The coal actually received was placed in Crail's large stock of coal held for resale, and he did not actually go into the market to purchase coal to replace that which had been lost in transit. The Supreme Court refused to approve the hard and fast application of the "market value" rule because it would permit Crail to recover more than

[3] A full grasp of the import of the holding can be gained only by reading the decisions of the District Court and the Circuit Court of Appeals in their handling of the case before it reached the Supreme Court. See Crail v. Illinois Central Railroad Co., C.C.A. 8, 1926, 13 F.2d 459, same case, U.S. D.C. Minnesota, 1927, 21 F.2d 836, and Illinois Central Railroad Co. v. Crail, 1929, 31 F.2d 111.

his actual loss. Its language (pp. 63-64) points the way to the correct decision here:

> "It is not denied that a recovery measured by the wholesale market price of the coal would fully compensate the respondent, or that the retail price, taken as the measure of the recovery allowed below, includes costs of delivery to retail consumers which respondent did not incur, and a retail profit which he had not earned by any contract of resale. But respondent contends, as was held below, that the established measure of damage for non-delivery of a shipment of merchandise is the sum required to replace the exact amount of the shortage . . .
>
> "This contention ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered, [citing authorities] and leaves out of account the language of the amendment, which likewise gives only a right of recovery for 'actual loss.' The rule urged by respondents was applied below in literal accordance with its conventional statement. As so stated, when applied to cases as they usually arise, it is a convenient and accurate method of arriving at an amount of recovery which is compensatory. . . .
>
> "There is no greater inconvenience in the application of the one standard of value than the other and we perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule, to its letter. The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more ac-

curate means resorted to if, for special reasons, it is not exact or otherwise not applicable. . . ."[6]

We think that the rigid application of the market value rule here resulted in awarding appellee more than its actual loss; and there is ground to believe that the court below had the same feeling.[7]

We are not, however, undertaking to weigh or appraise the evidence as to damages. We hold simply that the judgment appealed from clearly includes the award of some damages to which appellee was not entitled, growing out of the holding of the court below that no deduction should be made of sales commissions

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[6] We quoted with approval a portion of this language in our case of Waterman S.S. Co. v. United States S. R. & M. Co., 1946, 155 F.2d 687, 694. And cf. also Reider v. Thompson, 5 Cir., 1952, 197 F.2d 158.

[7] After making detailed findings that the shipments had been damaged the court below stated this: ". . . defendant insists that certain commissions which plaintiff would have had to pay should be deducted from any recovery. The court permitted proof to be made as to what these commissions would have been but denies a recovery therefor under Thompson v. H. Rouw Co., (Tex. Civ. App.) 237 S.W.2d 662, Texas and New Orleans Railroad Co. v. H. Rouw Co., (Tex. Civ. App.) 271 S.W.2d 666, and cases therein cited and discussed. . . . The court will enter findings if desired as to the total amount of commission which the plaintiff would have had to pay for which defendant claims the right to a deduction, which deduction is denied by the court."

Some weeks later the court below made a memorandum "containing additional findings of fact." In these findings the court referred to the items of commission on the difference in market value which formed the basis of this action. This supplemental memorandum was entered in response to motions of the parties for additional findings, appellant's motion being based upon the identical position presented in its appeal. The Court below concluded its supplemental findings with the statement: "In all other respects the motions of the parties for additional findings are overruled since they are for details and evidentiary, not ultimate facts."

and other charges figured on the amount of the difference in market values between delivery in good order and delivery in bad order. Appellee's recovery should be based upon this difference in market values, but not to exceed indemnity.

The judgment is reversed and the cause is remanded for the adjustment of the award of damages according to the evidence and in consonance with this opinion.

REVERSED AND REMANDED.

HUTCHESON, Chief Judge, dissenting:

Of the clear view that the two Texas cases relied on by the District Judge and cited in the opinion of the majority were correctly decided and that the majority opinion tithes mint, anise and cumin while rejecting weighter matters of the law, I align myself with the Texas courts and respectfully dissent from the opinion and decision of the majority.

A true copy

Test: Edward W. Wadsworth,
Clerk, United States Court of Appeals,
Fifth Circuit,
By /s/ Gilbert F. Ganucheau,
(Seal) Deputy.

New Orleans, Louisiana.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17059

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

v.

THE H. ROUW COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(September 24, 1958.)

ON PETITION FOR REHEARING.

Before HUTCHESON, Chief Judge, TUTTLE and CAMERON, Circuit Judges.

PER CURIAM:

Upon considering appellee's petition for rehearing it is ordered that the opinion filed herein August 27, 1958, be modified by adding the words: "(or the party entitled to recover)" after the word "owner" in the third line of said opinion.

Upon such modification, it is ordered that the petition for rehearing be and it is

DENIED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17059

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

v.

THE H. ROUW COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(October 27, 1958.)

ON SECOND PETITION FOR REHEARING.

Before HUTCHESON, Chief Judge, TUTTLE and CAMERON, Circuit Judges.

Considering appellee's second petition for rehearing it is ordered that the petition be and it is denied.

Hutcheson, Chief Judge, dissenting.